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Supreme Court of the United States

October Term, 1958

No. 382

O. Z. EVERS, *et al.*,

Appellants,

v.

JOHN T. DWYER, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, EASTERN DIVISION

STATEMENT AS TO JURISDICTION

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Statute Involved	3
Questions Presented	3
Statement of the Case	3
The Questions Presented Are Substantial	5
A. The Constitutional Question	5
B. The Decision of the Court Below	6
Conclusion	8
Appendix I—Opinion of the Court Below	9
Appendix II—Statutes Involved	16

Table of Cases

Baldwin v. Morgan, 251 F. 2d 780, 787 (5th Cir. 1958)	6
Baltimore City v. Dawson, 350 U. S. 877	5
Brown v. Board of Education, 347 U. S. 483	2, 5
Burnes v. Scott, 117 U. S. 582, 589	7
Doremus v. Board of Education, 342 U. S. 429, 434-435	6
Frothingham v. Mellon, 262 U. S. 447	7
Gayle v. Browder, 352 U. S. 903	2, 5
Gibson v. Board of Public Instruction of Dade County, 246 F. 2d 913 (5th Cir. 1957)	6
Holmes v. Atlanta, 350 U. S. 879	5
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 152	7

PAGE

Pierce v. Society of Sisters, 268 U. S. 510 7

Stark v. Brannan, 82 F. Supp. 614 (D. C. 1949), aff'd. 185 F. 2d 871 (D. C. Cir., 1950), aff'd. 342 U. S. 451 7

Toomer v. Witsell, 334 U. S. 385 2

Truax v. Raich, 239 U. S. 33 7

Wheeler v. Denver, 229 U. S. 342, 351 ..... 6, 7

Williamson v. Osenton, 232 U. S. 619 6

Young v. Higbee Co., 324 U. S. 204, 214 6

Supreme Court of the United States

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Appeal from the United States District Court for the Western District of Tennessee, Eastern Division

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STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and (5), files this, his statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the judgment of the District Court and should exercise such jurisdiction in this case.

Opinion Below

The opinion of the District Court has not yet been reported but a copy thereof appears as Appendix I to this statement.

Jurisdiction

The case below was brought by appellant to secure a declaratory judgment and interlocutory and permanent injunctions to restrain appellees from enforcing Sections 1704-1709, Title 65, Tennessee Code Annotated on the grounds that said statutes contravened the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Appellant invoked jurisdiction under 28 U. S. C. §§ 1331 and 1343(3) (Tr. 1) and a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284 (Tr. 24). This appeal is taken from the judgment of the three-judge court dismissing the action for lack of an actual controversy.

The final decree appealed from was made and entered on June 27, 1958 (Tr. 36). Notice of appeal was filed in the U. S. District Court for the Western District of Tennessee, Eastern Division on July 23, 1958 (Tr. 37).

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U. S. C. §§ 1253 and 2101(b).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case: *Brown* v. *Board of Education*, 347 U. S. 483; *Toomer* v. *Witsell*, 334 U. S. 385.

Appellant also filed a notice of appeal in the United States Court of Appeals for the Sixth Circuit (Tr. 40). This action was not taken because of any doubt that the jurisdiction of a three-judge court was properly and necessarily invoked under Title 28, U. S. C. § 2281, but rather because *Gayle* v. *Browder*, 352 U. S. 903, decided after the commencement of this action, may affect the substantiality of the federal question presented to this Court. Since the issue—whether a subsequent decision may affect the propriety of a direct appeal to this Court from a judgment

of a three-judge court whose jurisdiction was properly invoked initially—has not yet been fully clarified, appellant filed an appeal in the Court of Appeals.

Statute Involved

Sections 1704-1709, Title 65, Tennessee Code Annotated, 1955, requiring the separation of white and colored persons on street car lines operated in the state of Tennessee are not set out here because of their length, but appear in Appendix II to this statement.

Questions Presented

1. Whether Sections 1704-1709, Title 65, Tennessee Code, 1955, requiring racial segregation on street car lines operated in Tennessee are violative of the equal protection clause of the Fourteenth Amendment?

2. Whether appellant Evers, a Negro resident of Memphis, Tennessee, against whom Tennessee statutes requiring racial segregation have been enforced, may be barred from maintaining an action to declare said statutes unconstitutional and to restrain their enforcement, on the ground that this suit does not present an "actual controversy?"

Statement of the Case

On June 5, 1956 appellant, a Negro resident of the City of Memphis, Tennessee, brought this action against the Mayor and Commissioners of Memphis, the Chief of Police and two police officers of Memphis, the Memphis Street Railway Company and the operator of one of the Company's buses. Appellant sought a declaratory judgment that Title 65, Sections 1704-1709, Tennessee Code annotated, requiring segregation of white and Negro passengers on street car lines operated in the State of Tennessee,

was unconstitutional in that it offended the equal protection clause of the Fourteenth Amendment, and interlocutory and permanent injunctions restraining the enforcement of these statutes (Tr. 6, 7). The suit was brought as a class suit under Rule 23a of the Federal Rules of Civil Procedure on behalf of appellant Evers and all other Negroes similiarly situated.

In the complaint, appellant alleged that on April 26, 1956, he had boarded a bus operated by appellee railway company and had taken a seat normally reserved for white persons, that he had been ordered to move by the bus driver but refused to do so, that the driver summoned two policemen who advised appellant that he was violating state law and ordered him to move to the rear of the bus, leave the bus, or be arrested and that he elected to leave the bus (Tr. 4, 5).

All of the appellees admitted the substantial accuracy of these allegations (Tr. 10, 15, 21, 22), and on November 27, 1956, a motion for summary judgment was filed (Tr. 25).

Hearing on the merits of this cause was held before a three-judge court on January 6, 1958, nineteen months after the commencement of this action. At the hearing, counsel for appellees elicited from appellant the statements that he had used the public transportation facilities of Memphis only on the occasion described in his complaint (Tr. 117), that he owned an automobile (Tr. 117), and that he was not personally bearing the expenses of this action (Tr. 112, 118). Upon these statements, and evidence that appellant was employing a roundabout means of reaching his asserted destination (Tr. 150-153) appellees based a motion to dismiss.

On January 11, 1958, a further hearing was held to allow the intervention of the Governor and Attorney General of Tennessee. The Governor and Attorney General appeared by their attorneys, adopted all the defenses presented by the other appellees and submitted briefs in support of these defenses (Tr. 326).

On June 27, 1958, the court below entered an order dismissing the complaint on the ground that no actual controversy was presented for decision and that appellant had suffered no legal injury, basing this decision upon the facts brought forth at the January 6 hearing.

On July 23, 1958, appellant filed notice of appeal to this Court (Tr. 37) and to the Court of Appeals (Tr. 40).

The Questions Presented Are Substantial

A. The Constitutional Question.

In a series of decisions rendered since 1954, this Court has held that all forms of publicly sanctioned or enforced racial segregation are repugnant to the guarantees of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Baltimore City* v. *Dawson*, 350 U. S. 877; *Holmes* v. *Atlanta*, 350 U. S. 879; *Gayle* v. *Browder*, 352 U. S. 903. *Gayle* v. *Browder* applied this principle to public transportation, the field here involved.

But in several areas, state and local officials have sought to avoid the effect of these decisions by employing various colorable legal stratagems. In some cases these devices have delayed or nullified the enjoyment by Negro citizens of their rights to unsegregated public facilities.

In this case, it is submitted, the court below erroneously sanctioned a principle which, if sustained, will be used to further frustrate and postpone the vindication of these constitutional rights.

Appellant Evers' constitutional right to unsegregated public transportation facilities and the rights of those similarly situated can no longer be doubted. *Gayle* v. *Browder, supra.* Unless the court below was correct in concluding that appellant Evers had no standing to maintain this action, it was under obligation to enter an order vindicating the right to the use of public transportation facilities on a non-discriminatory basis.

B. The Decision of the Court Below.

The crux of the trial court's decision is a finding that appellant Evers did not really bring the suit in order to obtain for himself unsegregated public transportation, but rather for some other ulterior motive. From this finding, the court draws the legal conclusions that appellant did not suffer "legal injury" sufficient to give him standing to sue and that no "actual controversy" was presented. The finding, in turn, rests upon evidence that (1) appellant only used the transportation facilities of Memphis on one occasion; (2) appellant owns his own automobile.

At the outset, one may question whether any logic supports the findings the trial court drew from this evidence. Surely the court did not intend to suggest that in order to acquire standing to sue, appellant had either to subject himself on a regular basis to the segregated seating arrangement he found obnoxious or else submit to multiple arrests for attempting to violate state law.[1] And the court could hardly have meant to hold that owners of automobiles never have occasion to use a city's public transportation system and thus have no "interest" in it.

But even if it be conceded, *arguendo*, that these facts afford a basis for doubting appellant's motive in bringing this suit, dismissal was not proper. For, where a plaintiff adduces facts sufficient to bring him within the jurisdiction of the court and entitle him to relief, his motives in bringing the action are entirely irrelevant. *Doremus* v. *Board of Education*, 342 U. S. 429, 434-435; *Young* v. *Higbee Co.*, 324 U. S. 204, 214; *Wheeler* v. *Denver*, 229 U. S. 342, 351; *Williamson* v. *Osenton*, 232 U. S. 619.

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[1] It is even doubtful that appellant had to violate the law and subject himself to possible arrest at all in order to acquire standing to sue. *Baldwin* v. *Morgan*, 251 F. 2d 780, 787 (5th Cir., 1958); cf. *Gibson* v. *Board of Public Instruction of Dade County*, 246 F. 2d 913 (5th Cir., 1957).

The cases and principles cited by the court below support rather than negate appellant's right to maintain this action. See, e.g., *Frothingham* v. *Mellon*, 262 U. S. 447. Appellant was a member of the class, i.e., Negro citizens of Tennessee, *directly* affected by the statute in question; he did not merely suffer in "some indefinite way in common with people generally". And, appellant was not only in danger of sustaining injury as a result of the statute's enforcement, but actually had sustained such injury on one occasion. The presence of "legal" injury cannot be negated by a finding that, subjectively, appellant did not feel aggrieved by the action complained of where, as here, appellant's interest is created by specific provisions in the Constitution and laws of the United States. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 152.

This Court, in fact, has upheld the rights of action of parties far less immediately affected by government action than appellant here. See, e.g., *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 149 ff.

Unmentioned in the opinion of the court below, but underlying its decision is the fact that appellant is not personally bearing the expenses of this lawsuit.[2] For if appellant was incurring the expenses of this action, it would be extremely difficult for anyone to suggest that he did not really want for himself the relief sought. But it is well established that the fact that others are paying the expenses of litigation does not impair a party's legal interest or standing to sue. *Wheeler* v. *Denver*, 229 U. S. 342, 351; cf. *Stark* v. *Brannan*, 82 F. Supp. 614 (D. C. 1949), affd., 185 F. 2d 871 (D. C. Cir., 1950), affd. 342 U. S. 451.[3]

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[2] Appellees strongly urged this point as a ground for dismissal both in their briefs and at the hearing (Tr. 112, 118, 119, 145, 230).

[3] This is the rule even when the agreement to pay expenses is champertous. *Burnes* v. *Scott*, 117 U. S. 582, 589.

The last factor underscores the importance of the questions here presented. Complainants in cases involving civil rights are rarely in a position to bear all of the expenses of litigation, and almost always receive pecuniary support from a legal aid organization or other source. If the principle enunciated by the court below is allowed to stand, all plaintiffs who do not pay their own expenses may be subjected to a "purity of motive" test not based on any objective criteria. One more barrier to the vindication of precious constitutional rights will have been erected.

Appellants submit that the traditional concepts of "actual controversy" and "standing to litigate" cannot be twisted to achieve this result.

Conclusion

For the foregoing reasons, it is respectfully submitted, this appeal should be granted and the judgment of the court below should be reviewed and reversed by this Court.

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APPENDIX I

Opinion of the Court Below

PER CURIAM. This is a civil action brought by O. Z. Evers, a colored citizen, against the Mayor and Commissioners of the City of Memphis, individually and in their official capacities; the Chief of Police of Memphis, both individually and officially; two police officers of Memphis; a named employee of the Memphis Street Railway Company, operator of one of its buses; and the "Memphis Street and Railway Company." The complaint is based upon the alleged violation of the rights of plaintiff and other citizens similarly situated, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, in the enforcement by defendants of Sections 1704-1709, Title 65, Tennessee Code Annotated, 1955, requiring the separation of white and colored persons on street-car lines operated in Tennessee.

The charge is made that the aforementioned Tennessee Code sections are unconstitutional, in view of the decision of the Supreme Court of the United States in *Gayle* v. *Browder*, 352 U. S. 903, affirming the decision of a three-judge district court sitting in the Middle District of Alabama in 1956 (reported in 142 Fed. Supp. 707), generally known as the "Montgomery Bus Case". The plaintiff insists that the doctrine of *Plessy* v. *Ferguson*, 163 U. S. 567, has been entirely repudiated by the holding and pronouncements of the highest court in *Brown* v. *Board of Education*, 347 U. S. 483; *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877; and *Holmes* v. *Atlanta*, 350 U. S. 879.

Plaintiff avers that, on April 26, 1956, he was ordered by the bus operator to move from a front seat which he occupied to the rear of the bus. He refused and, later, two Memphis Police officers who, apparently, had been summoned by the bus operator, ordered him to obey, get off the bus, or be arrested. Whereupon, he left the car. He

pleads that he and those similarly situated are threatened with irreparable injury by reason of the acts of defendants of which complaint is made, and that there is no other plain, adequate and complete remedy other than by "this suit for an injunction."

The prayer of the complaint asks that a three-judge court, as provided for by Title 28, section 2284, United States Code, be convened; that an injunction restraining defendants from enforcing the sections of the Tennessee Code cited above be granted; and that defendants be restrained from enforcing "any and all customs, practices, and usages pursuant to which plaintiff or other persons similarly situated are segregated in the street cars of the Memphis Street and Railway Company, on the ground that such statutes are null and void and in violation of the Fourteenth Amendment to the Constitution of the United States." Declaratory judgment, pursuant to sections 2201 and 2202 of Title 28, United States Code, declaring and defining "the legal rights of the parties in relation to the subject matter of this controversy" is prayed.

Separate answers of the Mayor and City Commissioners of Memphis, of the Memphis Street Railway Company and its bus operator, and of two substituted police officers for those officers named in the petition (who had nothing to do with the matter) were filed; a three-judge court was lawfully designated; and the case came on for hearing before that court on January 6, 1958.

Immediately prior to the hearing, the defendants filed a motion for continuance on the ground that the five-day notice required by statute (28 U. S. C., section 2284) had not been given by the Clerk of the Court to the Governor and the Attorney General of Tennessee. At the hearing, it was insisted that the assembled three-judge court had no jurisdiction to proceed. Technically, there was merit in this position; but, inasmuch as the pendency of the suit and of the date set for hearing was a matter of common knowledge

and must have been known by the State officials, the court deemed it inadvisable to delay action beyond a time sufficient to permit the State of Tennessee to intervene. It was ordered, therefore, that the hearing proceed, that evidence be introduced and recorded and arguments heard, with the understanding that after appropriate notice had been given the Governor and the Attorney General of Tennessee the State could intervene and be heard; or, if the State so elected, all evidence received at the January 6 hearing should be expunged and the proceeding started *de novo*. This course was pursued by the court for the added reason that the counsel who took the lead for plaintiff had traveled from New York to attend the hearing and all parties except the State were represented by counsel in attendance. The further hearing was set for January 11 to afford opportunity for compliance with the provision of the statute requiring five days notice.

On January 11, 1958, the Solicitor General and the Assistant Attorney General of Tennessee appeared on behalf of the State and adopted all defenses made by the defendant officials of Memphis. When offered the opportunity, they expressed no desire to present additional proof, but did file briefs. Indeed, the second point made in the State's brief is, we think, determinative of the present case; that is to say that this action should be dismissed for lack of an actual controversy and of a real interest in the suit on the part of the plaintiff. The Federal Declaratory Judgment Act provides: "In a case of *actual controversy* within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations *of any interested party* seeking such declaration, whether or not future relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (Emphasis supplied) Title 28, section 2201, U. S. C.

In *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 272, 273, the Supreme Court asserted that a district court is without power to grant declaratory relief unless an actual controversy exists. The Supreme Court said, further, that the difference between an abstract question and a controversy contemplated by the Declaratory Judgment Act is necessarily one of degree; that it would be difficult—if possible—to fashion a precise test; and that the question in each case is basically whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

The Court of Appeals for the Sixth Circuit, speaking through Judge Shackelford Miller, Jr., in *Walker* v. *Felmont Oil Corporation*, 240 F. (2d) 912, 916 (C. A. 6), said: "Although jurisdiction may exist, it does not follow that it must be exercised. The Declaratory Judgment Act confers a discretion on the court rather than an absolute right upon the litigant. *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U. S. 237, 241, 243, 73 S. Ct. 236, 97 L. Ed. 291; *Brillhart* v. *Excess Insurance Co.*, 316 U. S. 491, 494, 62 S. Ct. 1173, 86 L. Ed. 1620; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 63 S. Ct. 1070, 87 L. Ed. 1407. Federal courts should exercise their discretionary power with the proper regard for the rightful independence of state governments in carrying out their domestic policy. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of lower federal courts. *Commonwealth of Pennsylvania* v. *Williams*, 294 U. S. 176, 185, 55 S. Ct. 380, 79 L. Ed. 841; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 318, 334, 63 S. Ct. 1098, 87 L. Ed. 1424. A federal court in a declaratory judgment suit should give strong consideration to the public interest involved in the avoidance of needless friction with state policies. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496, 500, 61 S. Ct.

643, 85 L. Ed. 971; *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, 350, 71 S. Ct. 762, 95 L. Ed. 1002."

Moreover, the Court of Appeals for this Circuit, in an opinion by Judge Potter Stewart, states: "* * * It is well settled, however, that accepted principles governing equitable and declaratory relief are no less applicable where such relief is sought under the Civil Rights Act. *Giles* v. *Harris*, 1903, 189 U. S. 475, 486, 23 S. Ct. 639, 47 L. Ed. 909; *Douglas* v. *City of Jeannette*, 1943, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324. Federal courts have been chary of granting declaratory or equitable relief in an area of possible friction between federal and state jurisdictions. (Citing cases)." *Williams, et al.* v. *Dalton, et al.*, 231 F. (2d) 646, 648 (C. A. 6).

The Court of Appeals for the Seventh Circuit, in *Ex-Cell-O Corporation* v. *City of Chicago*, 115 F. (2d) 627, held that a party attacking the validity of a municipal ordinance had failed to meet the required standard of showing, not only that the ordinance was invalid, but also that he had sustained or was in immediate danger of sustaining some direct injury as the result of its enforcement; not merely that he had suffered in some indefinite way in common with people generally. The court quoted from the opinion of the Supreme Court in *Massachusetts* v. *Mellon*, 262 U. S. 447. See also *Federation of Labor* v. *McAdory*, 325 U. S. 450, 463, where it was said: "Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity in a declaratory judgment proceeding."

In the absence of a clear showing of an actual controversy and that he is genuinely being deprived of a constitutional right, no citizen should be privileged to obtain from a federal court a judgment which not only declares invalid the statutory law of a sovereign state, but also enjoins its enforcement.

In the instant case, the plaintiff, a colored postal clerk who had previously been a police officer in Cook County, Illinois, recently came to Memphis where he worked in the Post Office. On April 26, 1956, he boarded a Memphis Street Railway bus and took a front seat immediately behind the driver, who directed him to sit in the rear of the bus, stating that the law required it because of plaintiff's color. He refused to comply. The bus driver proceeded to a fire station, which he entered and where he remained for some ten minutes according to the plaintiff. When the bus reached another corner on its route, two police officers boarded the bus and asked what was wrong. The driver told them that the plaintiff and another man accompanying him had refused to move to the rear. The officers ordered plaintiff to go to the back of the bus, get off, or be arrested. He left the bus.

Plaintiff testified that he was coming down town to the Post Office and had ridden in an automobile owned by a friend whose name he could not recall to the point where he boarded the bus. The bus which he boarded was not headed directly toward the Post Office in the business district of the city, but in a different direction on a circuitous route which required several miles' extra travel to reach the down-town area. He denied that in getting on the bus on the particular day he was laying grounds for this suit; but, on cross-examination by the City Attorney, he admitted that *he had never previously ridden a bus in Memphis and that he had not ridden one since the incident in question.*

Plaintiff admitted further that he is the owner of an automobile at the present time and that he owned one at the time of the particular incident—the only occasion on which he had ridden a bus. It is thus obvious that he was not a regular or even an occasional user of bus transportation; that in reality he boarded the bus for the purpose of instituting this litigation; and that he is not in the position of representative of a class of colored citizens

who do use the buses in Memphis as a means of transportation. This is, therefore, not a case involving an actual controversy. Moreover, plaintiff has not suffered the irreparable injury necessary to justify the issuance of an injunction. In fact, his own testimony shows that he has not been injured at all.

Accordingly, the action is dismissed.

/s/ JOHN D. MARTIN,
United States Circuit Judge.

/s/ MARION S. BOYD,
United States District Judge.

/s/ WILLIAM E. MILLER,
United States District Judge.

APPENDIX II

Statutes Involved

Equipment and Operating of Street and Interurban Railroads

Title 65, Section 1704, Tennessee Code (1955). Portions of Car to Be Set Apart and Designated for Each Race.—All persons, companies, or corporations operating any street car line in the state are required, where white and colored passengers are carried or transported in the same car or cars, to set apart and designate in each car or coach, so operated, a portion thereof or certain seats therein to be occupied by white passengers, and a portion thereof or certain seats therein to be occupied by colored passengers; but nothing in sections 65-1704-65-1709 shall be construed to apply to nurses attending children or other helpless persons of the other race. (Acts 1905, ch. 150, section 1; Shan., section 3079a1; Code 1932, section 5527.)

Title 65, Section 1705, Tennessee Code (1955). Printed Sign to Indicate Cars or Parts of Cars for Each Race.—Large printed or painted signs shall be kept in a conspicuous place in the car or cars, or the parts thereof set apart or designated for the different races, on which shall be printed or painted, if set apart or designated for the white people, and it being a car so designated or set apart, "This car for white people." If a part of a car is so designated, then this sign, "This part of car for white people." If set apart or designated for the colored race, this sign to be displayed in a conspicuous place as follows, "This car for the colored race." If any part of a car is set apart or designated for said race, then this sign as follows, "This part of the car for the colored race." (Acts 1905, ch. 1950, section 1; Shan., section 3079a2; Code 1932, section 5528.)

Title, 65, Section 1706, Tennessee Code (1955). Conductor May Increase or Diminish Space for Either Race, or Require Change of Seats.—The Conductor or other

person in charge of any car or coach so operated upon any street car line shall have the right at any time, when in his judgment it may be necessary or proper for the comfort or convenience of passengers so to do, to change the said designation so as to increase or decrease the amount of space or seats set apart for either race, or he may require any passenger to change his seat when or so often as the change in the passengers may make such change necessary. (Acts 1905, ch. 150, section 2; Shan., section 3079a3; Code 1932, section 5529.)

Title 65, Section 1707, Tennessee Code (1955). Refusal of Passengers to Take Seats Assigned by Conductor and Designated for Their Race or Leave Car-Penalty.—All passengers on any street car line shall be required to take the seats assigned to them, and any person refusing so to do shall leave the car or remaining upon the car shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not to exceed twenty-five dollars ($25.00); provided, no conductor shall assign any person or passenger to a seat except those designated or set apart for the race to which said passenger belongs. (Acts 1905, ch. 150, section 3; Shan., section 3079a4; Code 1932, section 5530.)

Title 65, Section 1708, Tennessee Code (1955). Failure to Set Apart Portions of Car for Each Race-Penalty.—Any person, company, or corporation failing to set apart or designate separate portions of the cars operated for the separate accommodation of the white and colored passengers, as provided by sections 65-1704-65-1709, shall be guilty of a misdemeanor and fined in any sum not to exceed twenty-five dollars ($25.00). (Acts 1905, ch. 150, section 4; Shan., section 3079a5; Code 1932, section 5531.)

Title 65, Section 1709, Tennessee Code (1955). Special Cars for Exclusive Accommodation of Either Race.—Nothing in sections 65-1704—65-1709 shall be construed to prevent the running of extra or special cars for the exclusive accommodation of either white or colored passengers, if the regular cars are operated as required by sections 65-1704—65-1709. (Acts 1905, ch. 150, section 5; Shan., section 3079a6; Code 1932, section 5532.)

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 382

O. Z. EVERS, et al,
Appellants,

vs.

JOHN T. DWYER, et al,
Appellees.

Appeal from the United States District Court for the Western District of Tennessee, Western Division

MOTION TO DISMISS

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The Daily News, Memphis, Tenn., 10/13/58—60c.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statute Involved	2
Question Presented	2
Statement of Facts	2
Argument	3
Conclusion	4

Table of Cases

Wilentz et al. v. Sovereign Camp, Woodmen of the World 306 U. S. 573 at 582 ..... 3, 4

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MOTION TO DISMISS

The appellees, pursuant to United States Supreme Court Rule 16, file this motion to dismiss on the ground that the appeal does not properly lie to this Honorable Court, and on the further ground that an appeal in this case has been docketed in the United States Court of Appeals for the Sixth Circuit. (Tr. 40).

Opinion Below

The opinion of the District Court has not yet been reported, but a true copy thereof appears as Appendix I to the statement as to jurisdiction filed herein by the appellant.

Jurisdiction

Although appellant seeks to invoke jurisdiction under the sections set forth in statement as to jurisdiction, it appears quite evident from said statement that appellant is not satisfied that this Court, in fact, has jurisdiction of this appeal.

The opinion and order of the Three Judge District Court (Tr. 29-35) clearly show that no order was entered granting or denying an interlocutory or permanent injunction as required by 28 U.S.C. Sec. 1253.

Statute Involved

Sections 1704-1709, Title 65, Tennessee Code Annotated, which sections are set forth as Appendix II to the statement of jurisdiction.

Question Presented

Question presented is whether the action of the Three Judge District Court was correct in that plaintiff's (appellant's) action was dismissed for lack of an actual controversy and of a real interest in the suit on the part of said plaintiff.

Statement of Facts

The complaint is predicated on the basic proposition that plaintiff (appellant) has on numerous occasions been compelled to occupy segregated sections of buses owned and operated by the Memphis Street Railway Company in Memphis, Tennessee, and the implication of the allegations of said complaint is that plaintiff (appellant) at the time of the suit and in the future will be deprived of his civil rights. (Tr. 1, 5, 6).

The testimony of the plaintiff (appellant) was, however, (a) that he had never ridden on a bus in Memphis, Tennessee, before the one incident described in the complaint, (Tr. 117); (b) that he had never ridden on a bus in Memphis, Tennessee, since the incident described in the complaint, (Ibid); (c) that he owned an automobile, (Ibid); (d) that on the date of the incident described in the com-

plaint he was proceeding from his home in East Memphis to the main Post Office in down town Memphis, where he was employed, (Tr. 101); (e) that the bus which he boarded at the time of the incident was proceeding in a different direction on a circuitous route which required several miles extra travel to reach the down town area, (Tr. 95-96); (f) that the plaintiff (appellant) is not in the position of being representative of a class of colored citizens who do use the buses in Memphis as a means of transportation; (g) that he boarded the bus for the sole purpose of creating disorder, and a basis for this litigation.

Argument

On the undisputed testimony and the findings of the District Court, this case does not present an actual controversy for decision by this Court. The question of the constitutionality of the statute was not determined by the District Court, and the proper appeal tribunal is the United States Circuit Court of Appeals where this cause has been docketed and where it will be heard on call.

The opinion of the Three Judge District Court in substance states that in the absence of a showing of an actual controversy, and that appellant is being deprived of his constitutional right, no citizen should be privileged to obtain from the Federal Court a judgment which not only declares invalid the statutory law of a sovereign state, but also enjoins its enforcement . . . (Tr. 34).

For the purpose of avoiding repetition, appellees adopt the opinion of the District Court as sound and as determinative of the question of jurisdiction. There is, we believe, an analogy between the language of the Three Judge District Court herein above referred to, and the language contained in the case of *Wilentz et al vs. Sovereign*

Camp, Woodmen of the World, 306 U.S. p. 573 (582). "The extraordinary procedure before a court of three judges, designed for a specific class of cases sharply defined by the statute, cannot properly be extended to cases in which there is no substantial basis for relief by injunction restraining the action of state officers in enforcing or carrying into effect a challenged state statute of general application."

Conclusion

Respectfully, the appeal to this Court should be dismissed.

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October 14th, 1958.

Certificate of Service

I, Charles M. Crump, attorney herein and a member of the bar of the Supreme Court of the United States, do hereby certify that I have served upon counsel of record for the appellants a copy of the foregoing motion to dismiss by depositing true and correct copies thereof in the United States mail, first class postage prepaid, on October 16th, 1958, addressed as follows:

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CHARLES M. CRUMP,
Attorney for Appellees.

SUPREME COURT OF THE UNITED STATES

No. 382.—October Term, 1958.

O. Z. Evers, et al., Appellants, v. John T. Dwyer, et al.	On Appeal From the United States District Court for the Western District of Tennessee.

[December 15, 1958.]

Per Curiam.

Appellant, a Negro resident of Memphis, Tennessee, brought this class action in the Western Division of the United States District Court for the Western District of Tennessee, seeking a declaration as to his claimed constitutional right, and that of others similarly situated, to travel on buses within that city without being subjected, as required by Tenn. Code Ann., Title 65, §§ 1704–1709 (1955), to segregated seating arrangements on account of race. An injunction against enforcement of this statute or any other method of state-enforced segregation on Memphis transportation facilities was also sought. Various officials and officers of the City of Memphis, the Memphis Street Railway Company, and one of that Company's employees were named as defendants. After a hearing a three-judge District Court, without reaching the merits, dismissed the complaint on the ground that no "actual controversy" within the intendment of the Declaratory Judgment Act, 28 U. S. C. § 2201, had been shown, in that appellant had ridden a bus in Memphis on only one occasion and had "boarded the bus for the purpose of instituting this litigation," and was thus not "representative of a class of colored citizens who do use the buses in Memphis as a means of transportation."

Of course, the federal courts will not grant declaratory relief in instances where the record does not disclose an

"actual controversy." *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237. In *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273, this Court said: "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." In the present case we think that the record establishes the existence of an actual controversy which should have been adjudicated by the lower court.

The District Court found that when appellant boarded a Memphis bus on April 26, 1956, and seated himself at the front of the vehicle, the driver told him he must move to the rear, "stating that the law required it because of [his] color;" that following appellant's refusal to comply, two police officers shortly thereafter boarded the bus and "ordered [appellant] to go to the back of the bus, get off, or be arrested;" and that thereupon appellant left the bus. The record further shows that the appellees intend to enforce this state statute until its unconstitutionality has been finally adjudicated. We do not believe that appellant, in order to demonstrate the existence of an "actual controversy" over the validity of the statute here challenged, was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to colored passengers. A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the

statute which imposes the disability. See *Gayle* v. *Browder*, 352 U. S. 903, affirming the decision of a three-judge District Court reported at 142 F. Supp. 707. That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant. See *Young* v. *Higbee Co.*, 324 U. S. 204, 214; *Doremus* v. *Board of Education*, 342 U. S. 429, 434–435.

We hold that the court below erred in not proceeding to the merits. Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.